(3)

FILED
SEP 14 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-1839

In The

Supreme Court of the United States

October Term, 1997

SANTEE SIOUX TRIBE OF NEBRASKA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY TO BRIEF IN OPPOSITION

JOHN M. PEEBLES
Counsel of Record
CONLY J. SCHULTE
MONTEAU, PEEBLES, EVANS & MARKS, L.L.P.
12100 West Center Road, Suite 202
Omaha, Nebraska 68144
(402) 333-4053
Attorneys for Petitioner

September 11, 1998

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. THE CIRCUIT COURTS OF APPEAL HAVE ISSUED CONFLICTING DECISIONS OVER THE SCOPE OF GAMING SUBJECT TO TRIBAL-STATE COMPACT NEGOTIATIONS..... 1

II. THE CLASS III GAMING PROVISIONS OF IGRA ARE UNENFORCEABLE IN LIGHT OF THIS COURT'S DECISION IN *SEMINOLE TRIBE OF FLORIDA V. FLORIDA*, 517 U.S. 44 (1996) 6

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024 (2d Cir. 1990) 1, 5

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 5, 6

United States v. Santee Sioux Tribe, 135 F.3d 558 (8th Cir. 1998) 2

United States v. Spokane Tribe of Indians, 139 F.3d 1297 (9th Cir. 1998) 6, 7

STATUTES

18 U.S.C. § 1166 7

18 U.S.C. § 1166(c) 7

25 U.S.C. § 2701(5) 1, 2

25 U.S.C. § 2710(d)(1)(B) ..... *passim*

Neb. Rev. Stat. § 9-701 ..... 3, 4

Neb. Rev. Stat. § 28-1101(5) 4

Neb. Rev. Stat. § 28-1113(2) 4

ARGUMENT

I. THE CIRCUIT COURTS OF APPEAL HAVE ISSUED CONFLICTING DECISIONS OVER THE SCOPE OF GAMING SUBJECT TO TRIBAL-STATE COMPACT NEGOTIATIONS.

Respondent asserts that all federal circuits uniformly agree that, "A state has no duty to negotiate with respect to a form of gaming that its laws absolutely prohibit." Brief in Opposition at 6. Petitioner does not take issue with this, as the Indian Gaming Regulatory Act ("IGRA") does not require states to negotiate over forms of gaming that are absolutely prohibited by state "criminal law and public policy." 25 U.S.C. §§ 2701(5), 2710(d)(1)(B). However, under the court of appeals' decision in this case, even though a state does not prohibit a form of gaming as a matter of criminal law and public policy, an Indian tribe can only conduct such gaming in accordance with, and by acceptance of, the entire state corpus of laws and regulations governing such gaming.

Accordingly, there is a dispute among the federal circuits over whether, under IGRA, a state is obligated to negotiate with a tribe over an otherwise permitted form of gaming where the proposed gaming activity does not strictly conform to state regulatory law. *See* Pet. at 8-18. This conflict is over whether 25 U.S.C. § 2710(d)(1)(B) assimilates the entire state corpus of civil laws and regulations governing such gaming, or whether section 2710(d)(1)(B) requires a state to negotiate over the regulation of an otherwise permitted form of gaming. *Compare, Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024,

1030-31 (2d Cir. 1990), *with United States v. Santee Sioux Tribe*, 135 F.3d 558, 564 (8th Cir. 1998); Pet. App. 11-12.

In the present case, the Eighth Circuit Court of Appeals held that the gaming operated by Petitioner (player-activated electronic and electromechanical facsimiles of games of chance) "contraven[ed]" Nebraska law and was therefore not subject to negotiation under section 2710(d)(1)(B), despite the fact that this form of gaming is permitted by state gaming statutes. Pet. App. 11, 85-90; Pet. 11, n.8; Neb. Rev. Stat. § 9-701. The court of appeals stated:

> The Tribe's gaming activities violate the IGRA because they are conducted *in contravention of Nebraska law*. Under the IGRA, an Indian tribe may engage in a gaming activity on tribal lands only if that *specific gaming activity* is permitted under the laws of the state where the tribal land is located. *See* 25 U.S.C. § 2710(d)(1)(B).

Pet. App. at 11 (emphasis supplied).

The court of appeals' holding would assimilate the entire corpus of state laws and regulations governing gaming into any tribal-state gaming compact, because the court held that tribal gaming that would contravene *any* state law, including permissive regulatory laws, is not the proper subject of tribal-state compact negotiations under 25 U.S.C. § 2710(d)(1)(B). Furthermore, the decision below indicates that states need only negotiate over such "specific gaming" as is *affirmatively permitted* by state regulatory law. This decision directly contradicts IGRA, 25 U.S.C. § 2701(5), which provides:

> Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming

> activity is not specifically prohibited by federal law and is conducted within a State which does not, *as a matter of criminal law and public policy, prohibit* such gaming activity.

(emphasis supplied).

The court of appeals' strained interpretation of section 2710(d)(1)(B) leads to results that Congress never intended. For instance, if state regulatory laws permit five-card poker, a state would not be required to negotiate with a tribe for the operation of seven-card poker, because seven-card poker is "in contravention of state law" and is not a "specific gaming activity" affirmatively permitted by state law. Thus, seven-card poker would be considered "prohibited" for purposes of IGRA, 25 U.S.C. § 2710(d)(1)(B), even though state law permits that form of gaming (i.e., poker). Under the decision below, the congressional requirement that tribal state compacts be negotiated would be rendered meaningless, for there would be nothing open to negotiation.

In the present case, among the Nebraska laws found to be "contraven[ed]" was Neb. Rev. Stat. § 9-701, a statute which actually *permits* the operation of "telecommunications related," "player activated electronic or electromechanical facsimiles of games of chance."[1] Pet. App.

---

[1] After the court of appeals rendered its decision in this case, the Nebraska Attorney General issued an opinion which confirms that "player-activated electronic or electromechanical facsimiles of games of chance" are permitted under Neb. Rev. Stat. § 9-701 where such games are "telecommunications-related." Pet. Supp. App. at 4-5. Thus, to the extent that the court of appeals' decision may be read to hold that section 9-701

at 85; Pet. Supp. App. at 4-5. Games of chance (including gambling devices) operated pursuant to section 9-701 are *expressly exempted* from Nebraska criminal gambling laws. Neb. Rev. Stat. §§ 28-1101(5); 28-1113(2); Pet. App. 88-90. The gaming operated by Petitioner thus was not prohibited *as a matter of Nebraska criminal law and public policy.* Yet the court of appeals summarily concluded that the gaming operated by Petitioner was in contravention of state law, and further held that the state had no duty to negotiate with Petitioner for such gaming. Pet. App. 11, 16-17. The court of appeals apparently determined that the gaming operated by Petitioner did not comply with the regulatory terms and conditions imposed by section 9-701.[2] Thus, the court of appeals erroneously removed

---

absolutely prohibits *all* "player-activated electronic and electromechanical facsimiles of games of chance," it is erroneous. In light of this intervening development, and particularly in light of the fact that the court of appeals relied on this erroneous ruling to avoid addressing federal questions raised by Petitioner, Petitioner respectfully submits this Court should grant the writ, vacate the judgment below, and remand for further proceedings.

[2] The court of appeals did not elaborate on exactly how Petitioner's gaming contravened section 9-701. However, considering that Nebraska criminal statutes exempt games of chance operated pursuant to section 9-701 from criminal prohibition, the court must have determined that the tribal games were not in compliance with the regulatory terms imposed by section 9-701, such as "telecommunications-related." The court of appeals thus erroneously focused on compliance with the regulatory conditions of the gaming instead of whether the form of gaming itself (i.e., player-activated electronic or electromechanical facsimiles of games of chance) is permitted by state law.

from tribal-state compact negotiations all proposed gaming that does not strictly comply with all state regulatory terms and conditions imposed on an otherwise permitted form of gaming.

This is not a case where the court of appeals merely "misinterpreted Nebraska law."[3] Brief in Opposition at 5-6. More importantly, this case is about the interpretation of *federal law*, 25 U.S.C. § 2710(d)(1)(B), and whether the court of appeals erroneously construed section 2710(d)(1)(B) to assimilate all state regulatory gaming laws; this case is about whether the court of appeals' narrow construction of section 2710(d)(1)(B) is contrary to decisions of other circuit courts of appeal. In fact, the court of appeals' restrictive approach in this case was expressly rejected by the Second Circuit Court of Appeals in *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1030-1031 (2d Cir. 1990), wherein the court held:

> Under the State's approach, on the contrary, even where a state does not prohibit Class III gaming as a matter of criminal law and public policy, an Indian tribe could nonetheless conduct such gaming only in accordance with, and by acceptance of, the entire state corpus of laws and regulations governing such gaming. The compact process that Congress established as

---

[3] That this case involves much more than the mere misinterpretation of state law is also evident by the fact that the court of appeals relied on its misinterpretation to avoid addressing extremely important federal questions raised by Petitioner below, to wit: whether the Class III gaming provisions of IGRA are enforceable after this Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). *See infra*, pp. 7-9; Pet. at 21-25.

> the centerpiece of IGRA's regulation of Class III gaming would thus become a dead letter; there would be nothing to negotiate, and no meaningful compact would be possible.

There is a clear conflict among the federal circuits regarding the scope of gaming subject to negotiation pursuant to IGRA, 25 U.S.C. § 2710(d)(1)(B). Petitioner respectfully requests that this Court grant certiorari to resolve this conflict.

II. THE CLASS III GAMING PROVISIONS OF IGRA ARE UNENFORCEABLE IN LIGHT OF THIS COURT'S DECISION IN *SEMINOLE TRIBE OF FLORIDA V. FLORIDA*, 517 U.S. 44 (1996)

Petitioner asserted in the court below and in its Petition to this Court that, under this Court's standards for severing unconstitutional statutes, the Class III gaming provisions of IGRA are unenforceable in light of this Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). Pet. 21-25. Respondent argues that this issue does not warrant review because the gaming sought to be operated by Petitioner is "illegal" under Nebraska law. Brief in Opposition at 7-8. However, Respondent's argument is only valid if IGRA, 25 U.S.C. § 2710(d)(1)(B), is interpreted to assimilate the entire corpus of state regulatory law. Furthermore, in a case identical to the present case, the Ninth Circuit Court of Appeals held that, in light of this Court's decision in *Seminole Tribe*, "The Class III gaming provisions [of IGRA] can't form the basis for an injunction against the Tribe." *United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1301 (9th Cir. 1998).

Respondent's attempt to distinguish *Spokane Tribe* is equally flawed. Respondent states, "In that case, the United States sought to enjoin a Tribe's Class III gaming operation solely on the basis that it was being conducted without a tribal-state compact," thereby implying that the present case was brought on some other basis. However, like *Spokane Tribe*, in the present case Respondent sought to enjoin Petitioner's gaming solely on the basis that the gaming was conducted in the absence of a tribal-state compact.[4]

Respondent also claims that 25 U.S.C. § 2710(d)(1)(B) is a "separate prohibition against the operation of forms of gaming that are illegal under state law," and argues that *Spokane Tribe* left open the issue of whether section 2710(d)(1)(B) may be utilized as an independent basis for an injunction against tribal gaming. Brief in Opposition at 8. Once again, Respondent's argument is only valid if section 2710(d)(1)(B) is interpreted to assimilate the entire corpus of state regulatory laws. Petitioner submits that Respondent's argument further demonstrates the need for this Court to review the issues raised by Petitioner in this case.

---

[4] In fact, the administrative closure orders sought to be enforced against Petitioner were issued solely because the Tribe did not have a gaming compact with the State of Nebraska. Pet. App. at 44-46; 60. The only other basis for the Respondent's requested injunction was 18 U.S.C. § 1166, which was also the basis for the requested injunction in *Spokane Tribe*, and which, by its very terms, does not apply where there is a Class III gaming compact in effect. 18 U.S.C. § 1166(c); Pet. App. 76.

CONCLUSION

For the above reasons, and the reasons set for the Petition for Writ of Certiorari, Petitioner respectfully requests that said Writ be granted.

Respectfully submitted,

JOHN M. PEEBLES
Counsel of Record
CONLY J. SCHULTE
MONTEAU, PEEBLES, EVANS & MARKS, L.L.P.
12100 West Center Road, Suite 202
Omaha, Nebraska 68144-3960
Attorneys for the Santee Sioux Tribe of Nebraska

September 11, 1998

STATE OF NEBRASKA

(SEAL)

Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
CAPITOL FAX (402) 471-3297
1235 K ST. FAX (402) 471-4725

DON STENBERG
ATTORNEY GENERAL

I98-014
STEVE GRASZ
LAURIE SMITH CAMP
DEPUTY ATTORNEYS GENERAL

April 9, 1998

M. Berri Balka
State Tax Commissioner
P.O. Box 94818
Lincoln, NE 68509-4818

RE: Lucky Shamrock Phone Card Dispensers

Dear Mr. Balka:

You have asked our opinion regarding the legality of electronic long distance phone card dispensers marketed under the name "Lucky Shamrock." As you describe these devices, they accept currency and dispense tickets for $1.00 each which may be used for two minutes of long-distance phone service. The tickets also display various monetary denominations arranged in three lines and three columns. The machine contãins a video display which spins or rolls after reading a barcode on the ticket, and then displays the monetary symbols aligned in the same order and sequence as they appear on the ticket.

The machine does not dispense any currency or otherwise provide any payment or accumulation of credits.

You have asked whether such a machine is an illegal gambling device under Nebraska statutes, and whether it is authorized under the Nebraska Gift Enterprise Act.

The term "gambling device" is defined in Neb. Rev. Stat. § 28-1101(5) (1995) as follows:

> Gambling device shall mean any device . . . used or usable for engaging in gambling. . . . Gambling device shall also include any mechanical gaming device, computer gaming device, electronic gaming device, or video gaming device which has the capability of awarding . . . tickets or stubs redeemable for something of value. . . .

Neb. Rev. Stat. § 28-1107(1) (1995) provides:

> A person commits the offense of possession of a gambling device if he or she manufactures, sells, transports, places, possess, or conducts or negotiates any transaction affecting or designed to affect ownership, custody, or use of any gambling device, knowing that it shall be used in the advancement of unlawful gambling activity.

Neb. Rev. Stat. § 28-1107 (1995) provides:

> Proof of possession of any gambling device shall be prima facie evidence of possession thereof with knowledge of its contents and character.

The Nebraska Supreme Court has said that there are three elements of gambling: chance, price, and a prize. *See, e.g., Baedaro v. Caldwell,* 156 Neb. 489 (1953); *State v. Two IGT Video Poker Games,* 237 Neb. 145 (1991); *State v.*

Dodge City, 238 Neb. 439 (1991); *State ex rel Spire v. Strawberries, Inc.*, 239 Neb. 1 (1991).

With respect to the Lucky Shamrock devices, the element of "price" or "consideration" is present, because the devices accept currency. The element of "chance" or "risk" is present, because the tickets which are dispensed contain a variety of monetary symbols, and the player does not control what monetary denominations are displayed on the ticket and the video screen or how those monetary denominations are aligned in the columns and rows. It is unclear whether the element of "prize" or "reward" is present, because the machines themselves do not pay the player. Instead, the player would need to seek payment elsewhere. The best evidence to prove the "prize" or "reward" element would be evidence of pay-off.

There is no doubt that the Lucky Shamrock devices are "usable" for gambling. Despite the presumption of guilt set forth in § 28-1109, a prosecutor would need to present some evidence that the party in possession of the device knew it was to be used in advancement of unlawful gambling activity in order to prosecute that person for possession of the device or to initiate forfeiture proceedings. *See, e.g., State v. Two IGT Video Poker Games*, 237 Neb. 145, 153-54 (1991).

Assuming that there is a pay-off for "winners" who use the devices, the question then becomes whether the devices and the pay-off are lawful as a "gift enterprise."

The Nebraska Constitution, Art. III, § 24, provides in part:

> The legislature may authorize . . . gift enterprises which are intended solely as business promotions . . . without profit to the promoter of such . . . gift enterprises.

The Nebraska Gift Enterprises Act, Neb. Rev. Stat. § 9-701 (1997) states in part:

> Gift enterprise shall mean a . . . game of chance . . . conducted . . . in connection with the sale of consumer or trade products or services solely as business promotions in which the elements of chance and prize are present. Gift enterprise shall not include . . . any non-telecommunication-related, player-activated electronic or electro-mechanical facsimile of any game of chance; or any slot machine of any kind.
>
> . . . .
>
> An operator shall not . . . [r]equire an entry fee . . . or any other consideration as a condition of entering a gift enterprise or winning a prize from the gift enterprise, except that a contest, game of chance, or business promotion may require, as a condition of participation, evidence of the purchase of a product or service as long as the purchase price charged for such product or service is not greater than it would have been without the contest, game of chance, or business promotion.

The Lucky Shamrock devices are player-activated electronic or electro-mechanical facsimiles of a game of chance. Although the legislative history of the Nebraska Gift Enterprises Act does not disclose the legislative intent behind the term "non-telecommunications-related", we cannot conclude that such a device is "telecommunications-related" simply because it may dispense

long-distance phone cards. There is no rational basis for treating the dispensing of long-distance phone cards differently from the dispensing of other products for purposes of the Act. Although it might be argued that the devices are gift enterprises if pay-off is available for the tickets, we do not find that argument to be persuasive. If the Lucky Shamrock devices *were* considered to be gift enterprises, then the operators of the devices would be in violation of § 9-701(3)(e) if the charge for the two minute long-distance phone service through the Lucky Shamrock devices were greater than the cost of such long-distance phone service directly from the provider or from other sources, or if the promoter of the enterprise were making a profit from it.

Additional investigation of the Lucky Shamrock devices is warranted to determine (1) whether and how players receive pay-off for winning tickets, (2) whether the tickets dispensed by the devices can be redeemed for two minutes of long-distance phone service and, if so, the company providing the phone service, and (3) the standard cost of two minutes of long-distance phone service from the provider or from others offering such phone cards. The answers to these questions will determine whether or not the owners and/or operators of the devices may be prosecuted for promoting gambling or possession of gambling devices or records; whether the devices may be subject to forfeiture; and, if the devices were viewed as gift enterprises, whether the owners of

the devices would be subject to prosecution for violation of the Nebraska Gift Enterprises Act.

Sincerely,

DON STENBERG
Attorney General

/s/ Laurie Smith Camp
Deputy Attorney General